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THE DRAFT JUDGMENTS CONVENTION AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL INSTRUMENTS

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I. Introduction

The "Judgments Project" refers to the work done, since 1992, by The Hague Conference on Private International Law (hereinafter, "The Hague Conference"), the international organisation for cross-border cooperation in civil and commercial matters. The Hague Conference has long pursued the ambitious goal of producing a potentially worldwide convention that could provide, on a much larger scale, the benefits of systematic recognition and enforcement of foreign judgments presently found in the European Union. Initially, the Hague Conference sought to develop a "double convention"[1] on international jurisdiction *and* the recognition and enforcement of foreign judgments. However, lack of consensus between the Hague Conference Members,[2] mostly on the appropriate approach to issues of jurisdiction, ultimately required the original project to be scaled down, and led to the conclusion of the Convention on Choice of Court Agreements of 30 June 2005.[3] In 2012, the Council on General Affairs and Policy of The Hague Conference decided to relaunch the work on the Judgments Project[4] and relatively soon, in this second attempt at the project,[5] the idea of a "double convention" was abandoned. The

[1] For the concept of single, double and mixed conventions see A. T. VON MEHREN, Recognition and Enforcement of Foreign Judgments: A New Approach for The Hague Conference?, (1994) 57 *Law & Contemporary Problems* 271; ID., Theory and practice of adjudicatory authority in private international law: a comparative study of the doctrine, policies and practices of common and civil law systems: General course on private international law, *Recueil des cours*, vol 295 (2002), 9-432.

[2] The Hague Conference currently has 83 Members: 82 States and 1 Regional Economic Integration Organisation, the European Union. For an overview of the Membership evolution see https://www.hcch.net/en/states/hcch-members, last accessed on 28 March 2018.

[3] The Convention on Choice of Court Agreements adopted on June 30th 2005 entered into force on October 1st 2015 and at the time of writing Mexico, the European Union (except Denmark) and Singapore are parties to the Convention. Available on: https://www.hcch.net.

[4] Hague Conference on Private International Law, Conclusions and Recommendations of the Council on General Affairs and Policy of the Conference (17 to 20 April 2012); Conclusion and Recommendation No 16, and Conclusions and Recommendations of the Experts' Group on Possible Future Work on Cross-border Litigation in Civil and Commercial Matters, Work. Doc. No 2 of April 2012 for the attention of the Council on General Affairs and Policy of the Conference.

[5] Between 2012 and 2015, a Working Group was constituted. It met five times and completed its work on a proposed draft text in November 2015 (first phase). Afterwards, the Council decided to convene a Special Commission, where all the Members could be represented, and where international organisations and stakeholders could also participate as observers, to prepare a draft Convention (second phase). Four Special Commission meetings took place at The Hague in June 2016, February 2017, November 2017 and May 2018. The resulting draft Convention ('the May 2018 draft Convention') will be presented to the HCCH Council at its March 2019 meeting with a view to the adoption of the Convention at a Diplomatic Conference in mid 2019.

focus since then has been on the adoption of a convention on the recognition and enforcement of foreign judgments including jurisdictional filters.[6]

As recognised by the *co-Rapporteurs* in the Preliminary Explanatory Report, the relationship of the prospective new instrument with other international instruments "is one of the most difficult questions dealt with in the draft Convention."[7] Against this background, there is no need to emphasise the significance that compatibility or coordination clauses have in relation to the application of the prospective new Convention, bearing in mind that there are several international instruments with overlapping scopes of application in this field, along with the ever-increasing sophistication of the overall global legal landscape.

The principles and rules to be applied by the courts and juridical operators in relation to the interface between the draft Convention and other international instruments is provided for in Article 24 of the May 2018 draft Convention. On the other hand, the relationship between the draft Convention and national laws is provided for in Article 16. Drawing from the extensive research conducted by the authors in the context of the PILIM project,[8] and their participation in the Special Commission meetings as representatives of the American Association of Private International Law (ASADIP),[9] the authors in this contribution focus on the relationship of the prospective new convention with existing instruments in the field of recognition and enforcement of foreign judgments in Latin America.

First, this contribution analyses conceptually the necessary coordination of normative frameworks in private international law in this field. Secondly, the platform where that coordination takes place is examined, including reference to the general principles of international law codified in the Vienna Convention on the Law of Treaties. Furthermore, the concept of coordination/ compatibility clauses adhered to is explained and a taxonomy of coordination clauses is provided, before critically analysing the coordination provisions of the draft Convention. Against that frame of reference, the prospective "dialogue" of the draft Convention with the MERCOSUR legal landscape is subsequently outlined. Overall, this contribution argues that the maximum effectiveness principle, currently not explicit in the text of the draft Convention, if clearly provided for could facilitate the day-to-day role of judges and courts in applying the provisions of the Convention against a sophisticated network of

[6] Jurisdiction filters are provided for in article 5 of the Draft Convention under the heading of "Basis for Recognition and Enforcement".

[7] See G. SAUMIER/F. GARCIMARTIN, Judgments Convention: Revised Preliminary Explanatory Report, Prel. Doc. No. 10 of May 2018, para 373. Note that this preliminary document was prepared based on the November 2017 draft Convention; nonetheless, the relevant provisions analysed in this contribution, i.e. arts. 24 (in the May 2018 draft) and 16 remain with the same wording as in the previous draft. A further revised version of the preliminary explanatory report is expected for December 2018.

[8] See further http://www.pilim.law.ed.ac.uk. See also V. RUIZ ABOU-NIGM/ M.B. NOODT TAQUELA, *Diversity and Integration in Private International Law* (EUP forthcoming).

[9] The authors have represented the American Association of Private International Law (ASADIP) at the last three meetings of the Special Commission.

international and regional instruments on international judicial co-operation. Ultimately, a specific means of including such a principle in the new prospective instrument is suggested.

II. "The Dialogue of the Sources"[10]

The prospective new instrument is being designed with the potential to be adopted globally. Nevertheless, instruments of this kind are by definition "inchoate and selective".[11] Coordination between international instruments, and between them and national law in this field, is undoubtedly crucial, as the potential conflict between different and overlapping instruments is a perennial feature of private international law more generally, and of special importance in the field of recognition and enforcement of foreign judgments. As explained in the Preliminary Explanatory Report,[12] the conflict between treaties arises only if there is incompatibility between two treaties that are applicable in the requested court, *i.e.* the application of the two treaties must lead to different results in a concrete situation.[13] Where there is no incompatibility, both treaties can be applied.

Examples of coordination provisions to pre-empt and to solve these potential conflicts appear in many international treaties adopted under the auspices of The Hague Conference,[14] as well as many other international instruments. These "coordination clauses" or "compatibility clauses" – both expressions are used indistinctively throughout this contribution – provide the setting for the "dialogue of the sources" as theorised in the well-known work of Erik Jayme.[15]

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[10] The expression was coined by Erik JAYME in "Identité culturelle et intégration: Le droit international privé postmoderne", *Recueil des cours*, Vol. 251 (1995), 9 *et seq*., paras. 60 and 259.

[11] See the long list of matters excluded from the scope of application in art. 2 of the draft Convention. See further D. FRENCH/ V. RUIZ ABOU-NIGM, Jurisdiction: Betwixt Unilateralism and Global Coordination, in V. RUIZ ABOU-NIGM *et al*., *Linkages and Boundaries in Private and Public International Law*, Hart Publishing, 2018, 75-104.

[12] G. SAUMIER/F. GARCIMARTIN, Judgments Convention: Revised Preliminary Explanatory Report, Prel. Doc. No. 10 of May 2018, para 374. An explanation on the same lines is also provided in T. HARTLEY/ M. DOGAUCHI, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention, Permanent Bureau of The Hague Conference, 2013.

[13] HARTLEY/ DOGAUCHI, (note12), 849, para 267.

[14] On compatibility clauses in HCCH conventions more generally see P. VOLKEN, Conflicts between Private International Law Treaties, in W.P. HEERE (ed), *International Law and the Hague's 75th Anniversary*, The Hague, TMC Asser Press, 1999, 149 and S. ÁLVAREZ GONZÁLEZ, Cláusulas de compatibilidad en los Convenios de la Conferencia de La Haya de Derecho Internacional Privado, (1993) XLV *Revista Española de Derecho Internacional* 1, 39.

[15] E. JAYME, (note 10), paras 9 *et seq*., 60 and 259.

Jayme's reference to a "dialogue" points to the reciprocal influences between the different sources, enabling the application of several sources at the same time, concurrently or alternatively; authorizing the choice of the parties between instruments; or even providing for an opt-out mechanism in favor of an alternative, more suitable, solution.[16] For Jayme there are two main ways to resolve the possible conflicts generated by postmodern pluralism: the first is to give prominence to one source, discarding the other. That is, granting a certain hierarchy amongst them; the second involves seeking the co-ordination of sources.

The latter methodology, *i.e.* the "dialogue of the sources", allows for different normative ensembles and accommodation. Since this expression was coined over twenty years ago, much more sophistication in compatibility clauses has been introduced into modern international treaties and other instruments with international scopes of application, to allow further interaction between potentially overlapping normative layers. Nevertheless, the theory of the dialogue of the sources as a methodology of normative accommodation has been considered part of a "new general theory of law",[17] offering flexible mechanisms allowing an open interpretation of international treaties. Its role in facilitating the application of the most favourable rule to weaker parties, or the most favourable rule to enable international judicial cooperation, is recognised by leading scholarship.[18]

In the case of several international treaties, the general framework within which this normative accommodation takes place is provided for in the 1969 Vienna Convention on the Law of Treaties. The Vienna Convention sets the international law parameters within which "coordination" or "compatibility" clauses included in international treaties can operate.[19]

III. The Vienna Convention on the Law of Treaties

> Article 30 - Application of successive treaties relating to the same subject-matter

[16] See, C. LIMA MARQUES, Procédure civile internationale et MERCOSUR: pour un dialogue des règles universelles et régionales, *Uniform Law Review* 2003-1/2, 465 *et seq*., 468.

[17] C. LIMA MARQUES, O "Diálogo das Fontes" como método da nova teoria geral do direito: um tributo a Erik Jayme, in C. LIMA MARQUES (coord.), *Diálogo das Fontes. Do conflito à coordenação de normas do direito brasileiro*, São Paulo, Editora Revista Dos Tribunais, 2012, 17, 21 and 28.

[18] See further M.B. NOODT TAQUELA, Applying the most favourable treaty or domestic rules to facilitate private international law co-operation, *Recueil des Cours*, vol. 377 (2016), 121-318.

[19] "Coordination clause" is the term used by A. MALAN, *La concurrence des conventions d'unification des règles de conflit de lois*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, PUAM, 2002.

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
>
> (a) as between States parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

The Vienna Convention provides the general international law framework for the interpretation and application of international treaties irrespective of their substantive content.[20] This Convention codifies the outer limits of interaction with regard to successive treaties relating to the same subject matter. Indeed, article 30 is generally regarded as stating the rules of customary international law on the point;[21] hence its authority extends beyond the States parties to the Vienna Convention.

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[20] J. BASEDOW, Uniform Private Law Conventions and the Law of Treaties, (2006) *Uniform Law Review* 731, 736.

[21] See, *inter alia*, A. REMIRO BROTÓNS, *Derecho internacional*, València, Tirant lo Blanch, 2007, 598, para. 324, who cites the case of the International Court of Justice of 17 December 2002, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/ Malaysia), at 645, para. 37. See further M.G. MONROY CABRA, Interpretación de los tratados internacionales, in *Liber Amicorum en homenaje al profesor Dr. Didier Opertti Badán*, Montevideo, Fundación de Cultura Universitaria, 2005, 685 *et seq*., 694 and footnote 19; A. AUST, *Modern Treaty Law and Practice*, 2nd ed., Cambridge, Cambridge University Press, 2007, 227 *et seq*; M.E. VILLIGER, The 1969 Vienna Convention on the Law of Treaties – 40 Years after, *Recueil des cours*, Vol. 344 (2010), 9 *et seq.* See also O. CORTEN, *Méthodologie du droit international public*, Brussels, Editions de l'Université de Bruxelles, 2009,138.

The purpose of compatibility clauses is therefore to provide, in accordance with the provision of 30.2 of the Vienna Convention, that in certain scenarios the "dialogue" should take a specific direction.[22] The ever-increasing sophistication of these provisions[23] tries to anticipate the many possible clashes between different provisions in practice. In the following paragraphs, conceptual remarks as well as a taxonomy of compatibility clauses are offered with a view to deepening the understanding of the full range of possibilities when it comes to drafting these "coordinates". Moreover, provisions 30.3 and 30.4 of the Vienna Convention establish the priority of the *lex posterioris* as a supplementary rule of last resource;[24] 30.3 applies only to the extent that the parties to both instruments are the same, and 30.4 reinforces the principle of *pacta sunt servanda* in this context, *i.e.* the general principle of international law that underlies the entire system of treaty-based relations between sovereign States.

IV. "Coordination Clauses" or "Compatibility Clauses"

As Noodt Taquela explains, "the simplest and most effective method to resolve conflicts between treaties is to prevent conflicts from happening. Compatibility rules are generally perceived as a way of avoiding conflicts between international treaties."[25] However, the interaction of sources is rarely that simple. And the many instances of interface, "dialogue" and coordination between sources demand craftsmanship to achieve the underlying objectives of the instruments under consideration. A compatibility clause, according to Weckel,[26] is any provision by which the parties make explicit the content and scope of the obligations arising from the agreement with respect to other treaties already existing or that may be concluded in the future.

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[22] In the HARTLEY/ DOGAUCHI report (note12) the visualisation used is that of signposting, hence the reference there to "give-way" rules. We prefer the "dialogue" visualisation, not only because of the theorisation provided by Erik Jayme and his disciples (see the work of Claudia Lima Marques on this point) but also because the interaction between the sources may well go beyond any expected paths.

[23] See *e.g.* art 26 of The Hague Conference 2005 Convention on Choice of Court Agreements.

[24] See further A. SCHULZ, *The Relationship between the Judgments Project and Other International Instruments*, HCCH, Preliminary Document No. 24 of December 2003, prepared for the Special Commission of December 2003 on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, at 10, para. 24, available at: www.hcch.net.

[25] M.B. NOODT TAQUELA (note 18), para. 162, p. 208.

[26] P. WECKEL, *La concurrence des traités internationaux*, thèse, Université Robert Schuman de Strasbourg, 1989, 334.

For the purposes of this analysis a broad notion of "coordination clause" or "compatibility clause" is adopted, *i.e.* encompassing clauses not limited to the relations between treaties, and not limited to instruments referring to the same subject but considering the broader interaction between an international treaty and the legal landscape where it is expected to make an impact. In fact, a substantial number of conflicts in the application of treaties are due to the overlap of certain provisions between treaties on different subjects. For example, a treaty on recognition of foreign judgments may conflict with a convention on human rights, or provisions contained in investment treaties, or provisions included in international judicial cooperation instruments in general. Terminologically, "compatibility clauses" is the most commonly used term to refer to these clauses, though Roucounas[27] and López Martín[28] prefer the expression "relation clauses" and yet others, such as Malan, use "coordination clauses".[29] In this instance, the latter as well as "compatibility clauses" are adopted to signal the broadest relational conception. Such provisions are standard in The Hague Conference conventions of this century.

Noodt Taquela offers elsewhere a comprehensive taxonomy of these kind of clauses[30]. It goes beyond the scope of this article to engage fully with that classification, but for the purposes of this analysis it is useful to take recourse to some of the categories therein identified, *i.e.* the most relevant in relation to the impact of the prospective new Judgments Convention *vis à vis* the legal landscape in MERCOSUR countries.

V. Different Types of Coordination Clauses

A. Maximum Effectiveness Clauses

These are clauses providing for the application of the most favourable regime; in other words, they are intended to prevent any interpretation of a treaty that restricts the advantages and preferences granted by national law or other international agreements. These clauses aim to ensure the priority application of the norm that is most suitable to achieve the purpose of a treaty; hence, they are referred to as rules of maximum effectiveness.[31] Legal interpretation (or construction) becomes paramount in this context as the means to reconcile conflicting instruments.[32]

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[27] E. ROUCOUNAS, Engagements parallèles et contradictoires, *Recueil des cours*, Vol. 206 (1987), 9 *et seq.*; 86 *et seq.*

[28] A.G. LÓPEZ MARTÍN, *Tratados sucesivos en conflicto: criterios de aplicación*, Madrid, Universidad Complutense, Servicio de publicaciones, 2002, 133 *et seq.*

[29] A. MALAN (note 19), 32.

[30] M.B. NOODT TAQUELA (note 18), para. 162, p. 208.

[31] WECKEL (note 26), 361.

[32] *Ibid.*, 362.

One of the most well-known examples of a maximum efficiency clause is that provided for in Article VII.1 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[33] allowing the application of other existing conventions between States parties, or even the domestic legislation of the country where the award is relied upon, to establish more favourable conditions for the recognition of the award.[34]

> Article VII
>
> 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

This kind of compatibility clause is common in international judicial cooperation treaties. In some of them, the most favourable rule appears explicitly.[35]

A recent international convention that contains very detailed provisions on the relationship with other international instruments is the 2005 Hague Convention on Choice of Court Agreements[36]. The maximum efficiency principle is reflected in Article 26 (4):

> Article 26 Relationship with Other International Instruments […]
>
> (4) This Convention shall not affect the application by a Contracting State of a treaty, whether concluded before or after this Convention, for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party

[33] The New York Convention of 1958 has 159 States parties as of June 1st 2018. Information available at: http://www.uncitral.org/.

[34] See further A.J. VAN DEN BERG, Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note, in A.J. VAN DEN BERG (ed.), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series 2009, Vol. 14, Dublin, Kluwer Law International, 2009, 649 *et seq.*, and its Annex I: "Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards", 667 *et seq.*

[35] See, *e.g.* Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded in The Hague, on 5 October 1961, art. 8: "When a treaty, convention or agreement between two or more Contracting States contains provisions which subject the certification of a signature, seal or stamp to certain formalities, the present Convention will only override such provisions if those formalities are more rigorous than the formality referred to in Articles 3 and 4."

[36] On the relationship between the prospective new instrument with the 2005 Choice of Court Agreements Convention see the Preliminary Explanatory Report (note12), paras 380-386.

> to that treaty. However, the judgment shall not be recognised or enforced to a lesser extent than under this Convention.

Most Inter-American Conventions on international judicial cooperation of application in MERCOSUR countries include a compatibility clause whereby the principle of maximum effectiveness extends beyond the relationship with other international treaties and allows for the adoption of more favourable State practices, in formulas such as "This Convention shall not limit any provisions regarding […] in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of more favourable practices in this regard that may be followed by these States."[37]

However, it is interesting to note that the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[38] does not contain an explicit provision to that effect. Yet, the posterior 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments,[39] adopted in La Paz on 24 May 1984 within the framework of the CIDIP-III, does contain this kind of coordination clause:

> Article 8
>
> The rules contained in this Convention shall not limit any broader provisions contained in bilateral or multilateral conventions among the States Parties regarding jurisdiction in the international sphere or more favorable practices in regard to the extraterritorial validity of foreign judgments.

This provision is of particular relevance to our analysis, paving the way for the greatest possible impact of the prospective new Judgments Convention. This kind of provision is also included in the Amendment to the Protocol on Judicial Cooperation and Assistance in Civil, Commercial, Labour and Administrative Matters, amongst MERCOSUR Member States, signed in Las Leñas, Argentina, on 27 June, 1992.[40]

[37] See, *e.g.* Inter-American Convention on Letters Rogatory, concluded in Panama, on 30 January 1975, within the framework of the CIDIP-I (Article 15); Inter-American Convention on the Taking of Evidence Abroad, also adopted in Panama, on 30 January 1975 (Article 14), and the Inter-American Convention on Execution of Preventive Measures, signed in Montevideo, on 8 May 1979, within the framework of the CIDIP-II (Article 18).

[38] Adopted in Montevideo on 8 May 1979 (CIDIP-II).

[39] Adopted in La Paz on 24 May 1984 (CIDIP-III).

[40] The Amendment to the Protocol of Las Leñas was adopted by the Common Market Council (CMC) by Decision 7/02, but to date is not in force, since it requires the ratification of the four States parties to the Protocol and Uruguay has not ratified it as of June 1st 2018. Information available at: http://www.mercosur.int.

> Article 35
>
> The present Agreement does not restrict provisions of conventions on the same subject matter concluded earlier by the States Parties as far as those provisions are more favourable to the cooperation.

The application of the most favourable treaty rule also appears in conventions related to other subjects, for example, human rights. This is the case of Article 29 *(b)* of the American Convention on Human Rights, adopted in San José, Costa Rica, on 22 November 1969.[41]

B. "Neutral" Provisions

Just as there are compatibility clauses expressly aimed at achieving maximum effectiveness of the instrument where they are embedded, there are other provisions that declare the co-existence of treaties in the absence of conflict between their provisions.[42] This kind of provisions use formulations such as "is compatible with", "it is not against", "is without prejudice to", "do not abrogate", "shall not derogate from", or "do not affect". Some commentators call them "neutral clauses",[43] others talk of "pure compatibility clauses" and Noodt Taquela refers to them in her previous work as "clauses not expressly oriented in the direction of maximum effectiveness".[44] The draft Convention as well as the 2005 Hague Convention on Choice of Court Agreement formulate this as a rule of interpretation.[45] There are examples of this kind of provision in the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (article 25),[46] as well as in the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (article 32).[47]

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[41] The American Convention on Human Rights is in force in 23 of the 35 American States of the Organisation of American States; United States of America and Canada are not party, and two States denounced the Convention: Trinidad & Tobago and Venezuela. Information available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm. Art. 29 *(b)* provides: "No provision of this Convention shall be interpreted as: […] restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party".

[42] ÁLVAREZ GONZÁLEZ (note 14), 49.

[43] A. AUST, *Modern Treaty Law and Practice*, Cambridge, Cambridge University Press, 2000, 226 *et seq*.

[44] M.B. NOODT TAQUELA (note18), 218, para. 187.

[45] See the Preliminary Explanatory Report (note12), para 377.

[46] Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters signed on 15 November 1965: 73 States parties as of June 1st 2018.

[47] Adopted on 18 March 1970: 61 States parties as of June 1st 2018.

This kind of provision in a treaty requires following the general rules of interpretation and the supplementary means of interpretation stated in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.[48] The 2005 Hague Convention on Choice of Court Agreements provides in this regard:

> Article 26. Relationship with Other International Instruments
>
> This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

These provisions are typically not so neutral in practice, since they ultimately favour the realisation of the common objectives of the different international instruments that may be overlapping, hence, in a more nuanced manner they contribute to the realisation of the maximum efficiency principle.

C. Subordination Clauses

A different kind of coordination is provided by "subordination clauses", *i.e.* those giving priority to another previous or posterior instrument. This kind of provision is explicitly allowed for in Article 30 (2) of the 1969 Vienna Convention on the Law of Treaties. Examples of international treaties providing for this sort of subordination clause include the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.[49] This international convention gives priority to the 1975 Inter-American Convention on International Commercial Arbitration,[50] priority based on the subject-specific character of the latter. As argued by Noodt Taquela, this kind of priority of the special convention over a general one when the subject matter is within the remit of the special convention is a general principle in the "conversation" between international instruments, even if there is not an express rule requiring the subordination of the general treaty to the special one.[51] Subordination clauses are the most common in international treaties.[52]

The 2005 Hague Convention on Choice of Court Agreements includes a subordination clause in:

> Article 26. Relationship with Other International Instruments
>
> […]

---

[48] ÁLVAREZ GONZALEZ (note 14), p. 50; F. MAJOROS, *Les conventions internationales en matière de droit privé. Abrégé théorique et traité pratique*, Paris, Éditions A. Pedone, 1980, 66 *et seq*., 75 *et seq*.; D. BUREAU, Les conflits de conventions, *Travaux du Comité Français de Droit International Privé*, 1998-2000, 201 *et seq*., 208.

[49] Adopted in Montevideo on 8 May 1979 (CIDIP-II).

[50] Adopted in Panama on 30 January 1975 (CIDIP-I).

[51] M.B. NOODT TAQUELA (note 18), para 207.

[52] P. WECKEL (note 26), 343.

> (3) This Convention shall not affect the application by a Contracting State of a treaty that was concluded before this Convention entered into force for that Contracting State, if applying this Convention would be inconsistent with the obligations of that Contracting State to any non-Contracting State. This paragraph shall also apply to treaties that revise or replace a treaty concluded before this Convention entered into force for that Contracting State, except to the extent that the revision or replacement creates new inconsistencies with this Convention.
>
> […]
>
> (5) This Convention shall not affect the application by a Contracting State of a treaty which, in relation to a specific matter, governs jurisdiction or the recognition or enforcement of judgments, even if concluded after this Convention and even if all States concerned are Parties to this Convention. This paragraph shall apply only if the Contracting State has made a declaration in respect of the treaty under this paragraph. In the case of such a declaration, other Contracting States shall not be obliged to apply this Convention to that specific matter to the extent of any inconsistency, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the Contracting State that made the declaration.

D. Priority Clauses

There are coordination provisions that work in the exact opposite manner to that of subordination clauses; these are the clauses that declare the priority of the instrument where they are inserted. Several Inter-American Conventions that deal with matters regulated by similar Hague Conventions contain compatibility clauses that state the priority of the former, based on the principle of regionalism (over universalism). One example is Article 29 of the 1989 Inter-American Convention on Support Obligations:[53]

[53] Adopted in Montevideo on 15 July 1989. The Inter-American Convention on Support Obligations has 13 States parties as of March 15, 2018: Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Panama, Paraguay, Peru and Uruguay. Status available on the website of the Organization of American States: http://www.oas.org/juridico/english/sigs/b-54.html. We would like to mention that none of the States parties to the Inter-American Convention had signed either the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, which is in force in 24 States, nor the 1973 Hague Convention on the Law Applicable to Maintenance Obligations, which is in force in 15 States, mostly from Europe. Status of both Hague Conventions on the website of the Hague Conference: http://www.hcch.net.

> Article 29
>
> Among Member States of the Organization of American States that are parties to this Convention and to the Hague Conventions of October 2, 1973 on the recognition and enforcement of decisions relating to maintenance obligations and on the law applicable to maintenance obligations, this Convention shall prevail. However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Conventions of October 2, 1973.

A particularly interesting example is that of Article 34 of the 1989 Inter-American Convention on the International Return of Children:[54]

> Article 34
>
> Among the Member States of the Organization of American States that are parties to this Convention and to the Hague Convention of October 25, 1980 on the civil aspects of international child abduction, this Convention shall prevail. However, States Parties may enter into bilateral agreements to give priority to the application of the Hague Convention.[55]

E. Complementarity Clauses

As explained by Noodt Taquela some treaties are constructed in such a way as to complement another treaty; if this is the case, a compatibility clause may indicate

[54] Adopted in Montevideo, on 15 July 1989. The Inter-American Convention on the International Return of Children has 14 Contracting States: Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, Paraguay, Peru, Uruguay and Venezuela. Status as to March 15, 2018, available at the CIDIP-IV website: http:// http:// www.oas.org/juridico/english/sigs/b-53.html. All the States parties to the Inter- American Convention – with the exception of Antigua and Barbuda – are also parties to both treaties.

[55] In spite of this subordination provision, court practice in some South-American States such as Argentina and Uruguay has given priority to the Hague Convention on Matters of Child Abduction over the Inter-American Convention. The Supreme Court of Argentina ruled in 2013 in a case with Mexico, - that is party to both treaties, as well as Argentina-, to return the child to Mexico applying the general criteria set up in relation to the Hague Convention where applicable to the case, despite Article 34 of the Inter-American Convention (*Corte Suprema de Justicia de la Nación* (Supreme Court of Argentina), 21 May 2013, *F., C. del C. el G., R. T. V.D.L. s/ reintegro de hijo,* available only in Spanish on the website of the Supreme Court of Justice of the Argentine Republic: http://www.csjn.gov.ar/.) In Uruguay, the judges and the Central Authority apply the Hague Convention and not the Inter-American Convention, in spite of the fact that there is no bilateral treaty in force that gives priority to the Hague Convention. Interestingly, this practice is not based on the provision of the treaties themselves, as the compatibility clauses of these instruments do not mention State practice, as other Inter-American Conventions do (E Tellechea Bergman, Report, 16 May 2006).

the complementary nature of the instrument.[56] In general, the complementary convention is called an Additional Protocol or another similar denomination that demonstrates the nature of the later convention.

F. Incompatibility/Denunciation Clauses

For the sake of the adoption of new international instruments, States parties may need to compromise in relation to the adoption of future treaties. It is also possible that a clause requires that the States parties denounce previous treaties incompatible with the present treaty or request the revision of incompatible existing agreements.[57]

G. Disconnection Clauses: Regionalism v Universalism

Finally, in so far as relevant for the analysis in this article, there are coordination clauses that particularly recognise the specificity of regional arrangements in certain circumstances. The 2005 Hague Convention on Choice of Court Agreements provides a disconnection clause in the last paragraph of Article 26:

> Article 26 [....]
>
> (6) This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention
>
> (a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
>
> (b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

The 1979 Inter-American Convention on Execution of Preventive Measures[58] also has a rule that governs its relationship with other regional integration treaties:

> Article 17
>
> States Parties belonging to economic integration systems or having common borders may agree directly among themselves upon special methods and procedures more expeditious than those provided for in

[56] M.B. NOODT TAQUELA (note 18), para 266.

[57] P. WECKEL (note 26), 349 *et seq.*

[58] The Inter-American Convention on Execution of Preventive Measures is in force in 7 States: Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru and Uruguay; status as of March 15, 2018.

> this Convention. These agreements may be extended to include other States in the manner in which the parties may agree.

An example of the provisions mentioned in Article 17 is the one followed by three of the States parties of the Inter-American Convention – Argentina, Paraguay and Uruguay – when these States and Brazil signed the Protocol for Provisional Measures of Ouro Preto, in December 1994, in the frame of MERCOSUR.[59]

This outline has provided insight into the many possibilities and considerations that must be taken into account when considering prospectively the relation of the Judgments convention with other instruments in the MERCOSUR countries.

VI. The Developing Coordination Provisions in the Draft Convention

The following paragraphs critically analyse the coordination provisions of the draft Convention and a new provision is suggested to furthering the overall objectives of the new prospective international instrument.

A. Possibility of Application of National Law (Article 16)

The possibility of applying national law when its rules are more favourable to the recognition or enforcement of foreign judgments is a principle generally accepted in treaties on international judicial cooperation, including recognition and enforcement of foreign arbitral awards.

The draft Convention currently provides:

> Article 16. Recognition or enforcement under national law
>
> Subject to Article 6, this Convention does not prevent the recognition or enforcement of judgments under national law.

This provision is essential to understand the objective of the new prospective instrument, i.e. that the "draft Convention sets out a minimum standard for mutual recognition or enforcement of judgments, but States may go further than that standard."[60] It is based on the *favor recognitionis* principle.[61] Subject to the limits imposed by the exclusive bases of jurisdiction provided for in article 6, the interaction between the draft Convention and national law can be customised for the benefit of the judgment-creditor.[62]

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[59] MERCOSUR developed after the Treaty of Asunción of 1991 establishing a common market between Argentina, Brazil, Uruguay and Paraguay.

[60] See the Preliminary Explanatory Report (note12), paras 14, 113 and 328.

[61] *Ibid*, para 328.

[62] *Ibid*, para 329.

It is submitted that this provision could be better placed in Chapter III of the draft Convention dealing with "General Clauses" together with article 24 (relationship with other international instruments, analysed below), taking into consideration that both provisions relate to the interface of the prospective Convention with other layers of the legal framework with which the Convention is expected to interact.

B. "Dialogue of the Sources" (Article 24)

The underlying general principle is to favour compatibility:

> Article 24. Relationship with other international instruments
>
> 1. This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention.

The first indent of article 24 sets the general tone of the conversation and clearly establishes the general aim of the "dialogue" between the sources: that of compatibility. That is, where a provision in the Convention is reasonably capable of more than one meaning, the meaning that is most compatible with the other treaties should be preferred.[63]

This formulation has often been used in international instruments of this kind. The first indent of Article 26 of the 2005 Hague Convention on Choice of Court Agreements, as mentioned above, is the latest example.

C. Relation with Prior Instruments

> 24.2. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] that was concluded before this Convention entered into force for that Contracting State [as between Parties to that instrument].

The wording of the second indent is awaiting further discussion. The square brackets show where there is no consensus yet[64]. With this provisional wording it is hard to see what this first "give-way" rule, in the terms of the Preliminary Explanatory Report, aims to achieve. As explained in the Hartley/Dogauchi report in the context of the 2005 Choice of Court Agreements Convention, the question of determining when one treaty is prior to another raises considerable difficulties in international law.[65] The general view is that the time of conclusion of the treaties in question is decisive and not their date of entry into force. Following the model of the 2005 Choice of Court Agreements Convention, this provision, however,

[63] *Ibid*, (note12), para 377. See also HARTLEY/ DOGAUCHI, (note 12), 849, 270.

[64] See further the Report from the Chair of the Informal Working Group of 22 May 2018.

[65] HARTLEY/ DOGAUCHI (note 12), 853, 283.

provides a different "direction" indicating that the rule is applicable if the other treaty was *concluded* before the Convention *entered into force* for the State in question. Moreover, in the view of Hartley and Dogauchi, "if the other treaty complies with this rule, this rule will also apply to a new treaty that revises or replaces it, except to the extent that the revision or replacement creates new inconsistencies with the Convention".[66]

In its current version, with or without the wording in brackets, this "give-way" rule, rather than furthering understanding of the "dialogue" between the sources, adds unnecessary complexity to Article 24 as a whole, and it is submitted that a simpler, clearer, and more succinct formulation, may better serve the interest of a private international law instrument of this kind.

D. Relation with Posterior Instruments

> 24.3. This Convention shall not affect the application by a Contracting State of a treaty [or other international instrument] concluded after this Convention entered into force for that Contracting State for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that instrument. [Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.]

This second "give-way" rule is narrower than the previous one,[67] i.e. the posterior treaty may prevail only if it deals with the recognition and enforcement of judgments. Although the rules provided for in article 24.2 and 24.3 in the draft Convention seem to establish neutral coordination clauses in relation to prior or posterior instruments, it is submitted that a systemic interpretation of these rules could allow for the realisation of the maximum effectiveness principle, if necessary. The Preliminary Explanatory Report seems to confirm that in the commentary of article 24, "the procedure under one instrument could be more favourable than the procedure under the other instrument. The applicant seeking recognition and enforcement would then be entitled to use the more favourable process for recognition and enforcement."[68] To this effect, the Vienna Convention on the Law of Treaties enables the utilisation of the principle of "systemic integration",[69] establishing that international obligations are interpreted by reference to their normative environment, that is, the "system" in the words of Koskenniemi.[70]

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[66] *Ibid*.

[67] See Preliminary Explanatory Report (note12) para 387.

[68] *Ibid*, para 385. Note that the Preliminary Explanatory Report further recognises in this context that it might be necessary to further clarify this point.

[69] See Vienna Convention on the Law of Treaties, article 31 (3)(c).

[70] M. KOSKENNIEMI, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.682, 25, para. 37. He refers to CH. ROUSSEAU's

Notwithstanding the above, it is submitted that a simpler[71] and clearer provision could provide for that objective explicitly, and in this way contribute to attaining the overall goals of the Convention with much greater efficiency[72].

E. Disconnection Clause (with EU Regulations)

> 24.4. This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

F. Priorities Enabled by Declarations?

> 24.[5. A Contracting State may declare that other international instruments listed in the declaration shall remain unaffected by this Convention.]

Finally, there is no agreement to date regarding the inclusion of a further fifth indent allowing Contracting States to accord priority also to other international instruments by means of a declaration at the time of the adoption of the Convention. In general, declarations of this kind are less than ideal, as they detract from the harmonised level playing field in terms of minimum standards that the draft Convention aims to achieve.

Yet, as is well known, many of the provisions of a multilateral instrument of this sort are the result of compromises necessary to achieve consensus as to the desirability of the international instrument as a whole. Article 26 of the Choice of Court Agreements Convention, on which various of the provisions of Article 24 have been modeled, provide the possibility of "give-way" rules by means of a declaration in relation to specific matters. Nevertheless, from a purely technical perspective the proposed fifth indent, still in square brackets, should rather be avoided.

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words related to the duties of a judge in his classical article on Treaty Conflict published in 1932 (De la compatibilité des normes juridiques contradictoires dans l'ordre international, *Revue générale de droit international public,* Vol. 39 (1932), 133,153): "lorsqu'il est en présence de deux accords de volontés divergentes, il doit être tout naturellement porté à rechercher leur coordination plutôt qu'à consacrer à leur antagonisme".

[71] It cannot be overemphasized how important simplicity is for the final wording of these provisions. Simplicity and accessibility of the rule are of the essence for provisions dealing with issues that are inherently and technically complex. The instrument should be able to facilitate normative accommodation and effectiveness of the respective instruments rather than adding an extra layer of difficulty.

[72] Efficiency is key to a successful system for the recognition and enforcement of foreign judgments in civil and commercial matters (see Preliminary Explanatory report (note12) para 14).

VII. What is Missing in the Draft Convention?

It is submitted that the explicit inclusion of a provision indicating the maximum efficiency principle explained above would be a welcome addition. The maximum effectiveness principle is paramount in relation to the recognition and enforcement of foreign judgments. Ferenc Majoros defined the principle of maximum effectiveness as the rule of conflict of conventions according to which between two or more conflicting provisions, taking into account the matters governed, the one that allows for the most effective way to meet the objectives of the conventions in conflict should prevail.[73] Majoros explained that one of the subject matters which must follow the principle of maximum effectiveness is recognition of foreign judgments, because it is fair and logical that once a judgment seeks recognition and/or enforcement in a country that is bound to the terms of several treaties in relation to the country of origin of the judgment, recognition and enforcement should follow the most favourable conditions and the simplest and most efficient procedures.[74]

This issue has been analysed in relation to the recognition of foreign arbitral awards, applying the following provision of the New York Convention of 1958.

> "Article VII. 1:
>
> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

According to Fouchard, Gaillard and Goldman, this provision allows for the concurrent application of provisions included in different normative instruments, provided that the ensemble between them is most favourable to the recognition of the foreign arbitral award.[75]

Normative accommodation processes, *i.e.*, the "dialogue of the sources", require adaptability and are, by definition, dynamic and at times open-ended. Hence, general principles of interpretation, such as the first paragraph of Article 24 of the draft Convention, go much further in facilitating this "dialogue" than the "give-way" rules as presently drafted. Along the same lines, a more explicit enunciation of the maximum effectiveness principle can further the objectives of international treaties in the field of recognition and enforcement considered as a

[73] B. DUTOIT/ F. MAJOROS, Le lacis des conflits de conventions en droit privé et leurs solutions possibles, *Rev. crit. dr. int. pr.* 1984, 565 *et seq.* and 577 *et seq*.

[74] *Ibid.*, 565 *et seq*. and 577 *et seq.*

[75] E. GAILLARD/ J. SAVAGE (eds.), *Fouchard, Gaillard B. Goldman, On International Commercial Arbitration*, The Hague, Kluwer Law, 1999, paragr. 271, 137; see also J.D.M. LEW, L.A. MISTELIS, S.M. KRÖLL, *Comparative International Commercial Arbitration*, Kluwer, 2003, Chapter 26, 697, para. 34.

whole, *i.e.* to favour the freer circulation of judgments across national frontiers. In other words, to accommodate the discrepancies of rule-based systems, the craftsmanship of the judiciary is necessary, and their role is facilitated by clear guidelines that can be given by means of principles that emphasise the treaty's overall objectives. Priority rules may not be the most appropriate to accommodate overlapping and inconsistent rules; the malleability of principles may prove more appropriate to soften the edges, to fill the gaps, and ultimately to realise the objectives of international recognition and enforcement as much as possible in the required scenario. [76]

It is submitted, therefore, that two core guiding principles can go a long way in facilitating normative accommodation in this field: "systemic coordination" and "maximum effectiveness", being possible to reduce these two to one formula: *in pursuit of systemic coordination towards maximum effectiveness of the foreign judgment in the country of recognition and enforcement.*

Furthermore, it is suggested that the *favor recognitionis* principle could be expressly stated in the context of the relationship with other Conventions on the following lines:

> This Convention shall not affect the application by a Contracting State of a treaty or other international instrument, whether concluded before or after this Convention, that provides for more favourable rules for the purposes of obtaining recognition or enforcement of a judgment given by a court of a Contracting State that is also a Party to that treaty. Nothing in the other instrument shall affect the obligations under Article 6 towards Contracting States that are not Parties to that instrument.

In any case, it is understood that the facilitation of the recognition and enforcement of foreign judgments favors the judgment-creditor, yet there is a risk of affecting the interests of the judgment-debtor if due process is not respected.[77] Hence, the principles of interpretation in favour of compatibility and maximum effectiveness should always be coupled with the necessary safeguards to guarantee the rights of access to justice and to a fair trial.

[76] Ruiz Abou-Nigm discusses the suitability of general principles in the field of jurisdiction to achieve desired results in terms of "justice" and "systemic coherence" elsewhere (See D. FRENCH/ V. RUIZ ABOU-NIGM (note11), 75-104).

[77] M.B. NOODT TAQUELA (note 18), 302, para. 363.

VIII. The Draft Convention and the MERCOSUR Legal Landscape

There are several multilateral treaties on recognition and enforcement of foreign judgments in force in the MERCOSUR States and in other Latin-American countries. The 1992 Protocol of Las Leñas on Co-operation and Jurisdictional Assistance in Civil, Commercial and Administrative Matters was adopted within the framework of MERCOSUR and it is in force between Argentina, Brazil, Paraguay and Uruguay.[78] The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards,[79] is in force in ten Latin-American countries, included the four original States of the MERCOSUR Agreement. In addition, the 1940 Montevideo Treaty on International Civil Procedure Law, which also governs recognition and enforcement of foreign judgments, applies between Argentina, Paraguay and Uruguay. The latter provides, in addition to the traditional conflicts rule to govern the procedure, a material provision that provides for a more favourable procedure for recognition and enforcement of foreign judgments (article 7).[80]

In relation to the interaction between these overlapping international treaties, the established practice followed by Uruguayan courts allows the judgment creditor to seek enforcement under the Inter-American Convention or the Las Leñas Protocol provisions, combining them with the most favourable procedure provided for in the 1940 Montevideo Treaty. Uruguayan scholars and courts have established the "survival" of Article 7 of the 1940 Montevideo Treaty that provides for a specific (more expeditious) proceeding for enforcement before local judges or lower tribunals. In Uruguay, that practice is used instead of having recourse to the jurisdiction of the Supreme Court, the otherwise designated tribunal for seeking recognition and enforcement of foreign judgments[81]. This interesting

[78] S.J. BATTELLO, Reconocimiento de sentencias extranjeras en el derecho brasileño: los cambios producidos por el MERCOSUR, *Revista del Derecho del Comercio Internacional Temas y Actualidades DeCITA*, 04.2005, 496 *et seq*.; M.B. NOODT TAQUELA/ G. ARGERICH, Dimensiones institucional y convencional de los sistemas de reconocimiento de los Estados mercosureños, in D.P. FERNÁNDEZ ARROYO (coord.), *Derecho Internacional Privado de los Estados del Mercosur*, Buenos Aires, Zavalía, 2003, paras. 406 *et seq*, 441 *et seq*.

[79] Signed in Montevideo on 8 May 1979 (CIDIP-II).

[80] Article 7 provides: "*La ejecución de las sentencias y de los fallos arbitrales, así como la de las sentencias de tribunales internacionales, contempladas en el último inciso del art. 5, deberá pedirse a los jueces o tribunales competentes, los cuales, con audiencia del Ministerio Público, y previa comprobación que aquéllos se ajustan a lo dispuesto en dicho artículo, ordenarán su cumplimiento por la vía que corresponda, de acuerdo con lo que a ese respecto disponga la ley de procedimiento local*." […]

[81] As provided for in the relevant provisions of the national law in Uruguay, that is, the Uruguayan General Code of Procedure of 1988 (Ley No. 15.982/1988), article 541. The text with amendments is available – only in Spanish – on the website of the Uruguayan

normative accommodation gives the chance to request recognition of judgments rendered in Argentina or Paraguay, both States parties to the 1940 Montevideo Treaty, directly in the lower courts.[82]

The possibility of having recourse to this more favourable rule and interpreting the interface of overlapping international treaties as compatible, with a view to further more efficient enforceability, should not be affected by the new prospective Judgments Convention. The legal basis for this interpretation in favour of compatibility is aligned with the principle provided for in article 24.1 of the draft Convention as already discussed above. In fact, the draft Convention states that the procedure for recognition and enforcement of the foreign judgment is governed by the law of the requested State unless the Convention provides otherwise.[83] Hence, there is no reason why the specific procedure for enforcement before local judges or lower tribunals in Uruguay provided for by article 7 of the 1940 Montevideo Treaty should not continue to "survive".

Another example of the coordination of different sources on the lines of the interpretation provision provided for in article 24.1 of the draft Convention is a decision rendered by the Uruguayan courts when the Brazilian Court of Passo Fundo, Rio Grande do Sul, requested provisional measures in relation to property located in Uruguay. The Uruguayan court of first instance granted the attachment of property (the provisional measure) but denied the final enforcement of the foreign judgment, on the grounds that the requirements for recognition and enforcement of foreign judgments had not been completely fulfilled. The Uruguayan Court of Appeal confirmed the decision based on the joint application to the case of the 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, the 1992 Protocol of Las Leñas, and the bilateral treaty between Brazil and Uruguay on Judicial Co-operation in Civil, Commercial, Labour and Administrative Matters, signed in Montevideo on 28 December 1992, as well as the General Code on Procedure of Uruguay.[84]

IX. Operating in Realistic Contexts

Practitioners claim that for private international law to play a meaningful role in the resolution of modern transnational disputes, it must "stop worrying about

Parliament: http//www.parlamento.gub.uy/htmlstat/pl/codigos/EstudiosLegislativos/CodigoGeneraldeProceso2014-03.pdf.

[82] See E. VESCOVI, *Derecho Procesal Civil Internacional. Uruguay, el Mercosur y América*, Montevideo, Ediciones Idea, 2000, 181.

[83] Art 14 Draft Convention.

[84] *Tribunal de Apelaciones en lo Civil de Segundo Turno* (Uruguay), 19 April 2006, No. 9999-3-2004. See further M.B. NOODT TAQUELA, (note18), 205-206, para. 159.

mechanical methods and grammatical texts and rather begin operating in realistic contexts."[85]

From this more practical perspective, there are undoubtedly several other issues that would affect the impact of the prospective new convention. This contribution is mainly focused on the interaction with other instruments, but this is one aspect, and by no means the only important one considering the eventual impact of the future convention. For the sake of providing a broader picture, the analysis that follows very briefly addresses two additional issues, one procedural, and one substantive: both must be regarded as central to an impact assessment of the future convention. These are, first, the requirement or not of legalisation; and second, the dramatic importance of the extent of the public policy exception as a ground for refusal of recognition and enforcement of foreign judgments. The legal landscape of the MERCOSUR countries offers interesting angles in relation to both these issues.

A. Legalisation

Legalisation describes the procedures by which the signature and the seal on a public document are certified as authentic by a series of public officials along a "chain", to a point where the ultimate authentication is readily recognised by an official of the State of destination and can be given legal effect there. This official is the Consul of the State of destination accredited to the State of origin who is ideally situated to facilitate this process.[86] Some States require a further authentication by the Foreign Ministry of State of destination, to verify the signature of the Consul.

Abolishment of the requisite of legalisation was contemplated under a previous draft (Draft Convention of February 2017),[87] but this proposal was abandoned due to the opposition of several Members to this procedural simplification during the November 2017 meeting of the Special Commission. Hence, the draft Convention of May 2018 does not provide for an exemption in relation to the general requirement of legalisation. However, looking at the interface of the draft Convention with the legal landscape in the MERCOSUR countries, the exemption from legalisation provided for in many regional and bilateral instruments of the latter may apply under the principle of the most favourable rule. Exemption from legalisation is provided for in the 1992 Las Leñas

[85] C.T. KOTUBY JR, General Principles of Law, International Due Process and the Modern Role of Private International Law, (2013) 23 *Duke Journal of Comparative and International Law*, 411 at 412.

[86] HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, Permanent Bureau, *A Handbook on the Practical Operation of the Apostille Convention*, 2013.

[87] The February 2017 draft included article 19, in the following terms: "All documents forwarded or delivered under this Convention shall be exempt from legalisation or any analogous formality, including an Apostille". This provision is no longer part of the draft Convention.

Protocol: under article 26 of the Protocol, the documents transmitted through Central Authorities are exempt from authentication or similar formality.[88]

B. Public Policy

The draft Convention mentions public policy as a ground for refusal of recognition or enforcement under article 7.1(c)

> Article 7. Refusal of recognition or enforcement
>
> 1. Recognition or enforcement may be refused if […]– (c) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State and situations involving infringements of security or sovereignty of that State.

The provision reflects the exceptional and narrow concept of public policy, including procedural infringements of due process. This narrow concept of public policy is in line with the established concept of "international public policy" as defined in the Uruguayan Declaration to the 1979 Inter-American Convention on General Rules of Private International Law[89] as "an exceptional authorisation to the various States Parties to declare in a non-discretionary and well-founded manner" whenever the foreign judgment "manifestly offend the standards and principles essential to the international public order on which each individual State bases its legal individuality".[90]

It is regrettable that the draft Convention provision includes *in fine* "situations involving infringements of security or sovereignty of that State". It is submitted that this wording unnecessarily broadens the concept of the public policy exception, contrary to the overall Convention's objectives. This wording was between brackets in the preliminary draft of the working group and also in the draft Convention of February 2017, but the brackets were deleted during the third meeting of the Special Commission.

[88] Las Leñas Protocol is in force in the four original States of the MERCOSUR: Argentina, Brazil, Paraguay and Uruguay. The text of the Protocol in Portuguese and Spanish, as well as its status, is available on the MERCOSUR website: http://www.mercosur.int.

[89] 1979 Inter-American Convention on General Rules of Private International Law (CIDIP-II).

[90] Uruguay Declaration to the Inter-American Convention on General Rules of Private International Law of 1979. Available on: www.oas.org/juridico/english/sigs/b-45.html. See generally, C. FRESNEDO DE AGUIRRE, Public Policy: Common Principles in the American States, *Recueil des Cours*, vol. 379 (2016), 73.

X. Conclusions

This contribution reflects on the latest draft of The Hague Conference Judgments Convention, that of May 2018. The Convention is envisaged as a mechanism providing for the free circulation of judgments globally. The greater or lesser success of this prospective new Convention does not depend only on the intrinsic technical and political value of the new international instrument itself. Of great importance is how the prospective instrument will fit into any given legal landscape in order to provide maximum efficiency when it comes to the recognition of foreign judgments in the jurisdiction where recognition and/or enforcement is sought.

This analysis has sought to provide an assessment of the coordination provisions in the draft Convention. "Coordination clauses" or "compatibility clauses" are the simplest and most effective method to resolve conflicts between treaties. This contribution adopted the broadest conception of this notion, encompassing clauses not limited to the relations between treaties, and not limited to instruments referring to the same subject, but considering the broader interaction between an international treaty and the legal landscape where it is expected to make an impact. Among the different types of coordination clauses, the "maximum effectiveness clauses" and the so-called "neutral clauses" – not so neutral in practice – are of great importance in the analysis of the draft Convention. It is submitted that a systemic interpretation of these rules may lead to the application of the maximum effectiveness principle examined in this contribution, but that it would be more conducive to achieving the overall effects of the Convention to adopt a simpler and clearer provision to that effect in article 24, as suggested above[91], and explicitly provide for the principle of maximum effectiveness.

The new prospective instrument is sought as a minimum basis to allow for the recognition and enforcement of judgments between the Contracting Parties in line with instruments of this kind in analogous fields, such as the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, as well as the 2005 Hague Convention on Choice of Courts Agreements. Therefore, a clearer wording for article 24 could enhance the understanding of its intended effects and possibly contribute to a more expeditious path to approval, adoption and subsequent ratification of the new prospective instrument, in time, facilitating the day-to-day role of judges and courts in applying the provisions of the Convention against an over-increasingly sophisticated network of international instruments on international judicial co-operation.

[91] See *supra* page 238.